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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF PARENT-CHILD)
RELATIONSHIP OF T.W. and Tr.W., MINOR)
CHILDREN and THEIR FATHER LARRY)
WISEMAN,)

LARRY WISEMAN,)

Appellant-Respondent,)

vs.)

No. 49A05-0610-JV-602

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner,)

And)

CHILD ADVOCATES, INC.)

Appellee (Guardian ad Litem).)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria Ransberger, Judge Pro Tempore
Cause No. 49D09-0507-JT-25953

May 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Larry Wiseman appeals the involuntary termination of his parental rights to T.W. and Tr.W. Specifically, Wiseman claims he received ineffective assistance of trial counsel because his attorney (1) failed to object to the incorrect notice of the final termination hearing, and (2) failed to consult with Wiseman prior to the hearing.

We affirm.

On October 8, 2004, the Marion County Department of Child Services (MCDCS) filed a petition alleging T.W. and Tr.W. were children in need of services (CHINS).¹ The CHINS petition was filed because the children's parents failed to provide the children with a stable home environment free of domestic violence. Specifically, the family had been moving from one motel room to another, and Wiseman had been arrested for a domestic violence incident against the children's mother,² which occurred when the children were present.

¹ T.W. was born on October 4, 2001, and Tr.W. was born on April 29, 2003.

² The children's mother's parental rights were terminated in January 2006. Mother is not a party to the present case.

On December 16, 2004, MCDCS and Wiseman filed an agreed entry wherein Wiseman admitted that T.W. and Tr.W. were CHINS. The agreed entry served as both an admission of the CHINS petition and Wiseman's dispositional order. The children were also removed from the care and custody of Wiseman on the same day.

As part of the agreed entry, Wiseman agreed to complete certain services, which were subsequently ordered by the trial court. These services, including parenting assessment, domestic violence treatment, drug and alcohol assessment and treatment, home-based counseling, paternity testing, and individual or family counseling, were ordered to enhance his parenting skills and to help Wiseman remedy the situation that lead to the removal of the children.

The plan for T.W. and Tr.W. was changed from reunification with parents to termination of parental rights and adoption when MCDCS filed its petition for involuntary termination of the parent-child relationship on July 7, 2005. An initial hearing was held on October 4, 2005, and Wiseman was appointed a public defender. Wiseman failed to appear at a continuation of the initial hearing on November 8, 2005.

At a subsequent hearing held on January 3, 2006, Wiseman appeared and requested a change of judge and a new public defender. The case was transferred to a different court and Wiseman was referred to the public defender's office for a new lawyer. Wiseman appeared without counsel for a pre-trial hearing on March 6, 2005, but failed to appear for the termination hearing, which commenced on September 5, 2006, over one year after the termination petition had been filed.

At the termination hearing, Wiseman's attorney, Barbara Webb Clements, moved for a continuance, stating that she had not contacted, nor been contacted by, Wiseman. Clements further admitted, "I have not even attempted to contact him. He is one of the crush of files that I received the first of August. I know now that it is past the first of September and I apologize[,] but I have not written to him and I have not called him."

Transcript at 4.

The trial court denied Clements's request for a continuance. When Clements renewed her motion for a continuance at the end of the hearing, the trial court stated:

O.[K]., [the court] notes that the court record indicates that [Wiseman] has had three public defenders, that he received his rights form back in 2004. October 2005. And in fact he had ample opportunity to be here and to stay involved with his public defenders with the agency of which doesn't change although the name of the [attorney] may and the court denies the continuance motion.

Id. at 37.

At the termination hearing, Catina Anderson, a family case manager formerly employed with MCDCS, testified regarding her involvement with Wiseman's case. Anderson testified that the major barriers for reunification of Wiseman and the children were Wiseman's uncooperativeness and his refusal to complete services. Anderson acknowledged that Wiseman did, at the outset, comply with some of the dispositional order in that he submitted to a parenting assessment and a drug and alcohol assessment and even began drug and alcohol treatment. She further testified, however, that Wiseman never provided proof of paternity of the children, never completed the parenting and drug and alcohol classes which he had begun, never provided proof of stable housing and

employment, failed to regularly visit with the children, and failed to maintain weekly contact with her. Anderson further testified that Wiseman's whereabouts were unknown to MCDCS and that the last time he had contacted her was more than six months prior to the hearing.

When questioned on cross-examination, Anderson stated that she had sent notice of the termination hearing to Wiseman's last known address, but that it had been returned undelivered. She also testified that Wiseman had not participated in any agency services since the termination petition had been filed and that he had not visited the children in one year.

At the conclusion of the termination hearing, the trial court terminated Wiseman's parental rights to T.W. and Tr.W. In so doing, the trial court stated:

At this time I am going to show that this matter was set for 1:00PM, that the case manager waited until 1:30 for [Wiseman] to appear at the Juvenile Court. That in fact this matter was not convened until 2:17 as we awaited everyone to be here so we could get started. That the child [sic] was found a [CHINS] back in 2004. At the dispositional hearing the court determined that it was in the best interest of both of these children to remain in the wardship of [MCDCS]. That the children have been removed from [Wiseman] for at least six (6) months, [sic] alleged father. That there is a reasonable probability that the conditions that . . . resulted in the removal of the kids will not be remedied. That although [Wiseman] did begin some services which maybe had a little bit of hopeful point to it, and he got through the parenting assessment and he got through the drug and alcohol assessment. It appears that he may have started the domestic violence as well, he did not complete these services and he has had well over a year almost two (2) years since the time that the CHINS was filed. And it is appropriate . . . not only appropriate but very much a clear and convincing standard has been met to show that termination of these children and their alleged father³ is in the best interests of both [Tr.W] and [T.W.] That

³ We observe that Wiseman never established paternity of T.W. and Tr.W., even though he was ordered to do so by the trial court in its dispositional order.

although they have disturbed backgrounds, at least from what the case manager said[,] they are in care. . . . They do have a satisfactory plan for care and treatment. And the conditions that resulted in the placement just have not been remedied and that to just try to waive or put these back with either one of these folks would be a threat to the well-being of the children. We'll have an order out probably this week.

Transcript at 38-39. The trial court issued its written order on September 7, 2006.⁴ This appeal ensued.

Wiseman argues that he received ineffective assistance of trial counsel and was therefore denied due process of law. In support of this argument, Wiseman asserts two errors, namely: (1) that in failing to contact him, it was impossible for Wiseman's counsel to advocate for his position, and (2) that Wiseman's counsel should have objected to the improper notice of the termination hearing that MCDCS provided to Wiseman.

MCDCS counters that Wiseman's attorney provided diligent representation for him at trial by raising objections and cross-examining witnesses. MCDCS further points out that its notice to Wiseman was proper in that it followed statutory guidelines by sending notice of the hearing to Wiseman's last known address. Finally, MCDCS asserts that even assuming, *arguendo*, trial counsel's representation was deficient, as Wiseman suggests, Wiseman has failed to show that, but for the alleged deficiency, a different outcome would have been reached. We agree.

⁴ Even though the trial court titled its judgment a "Default" judgment, *Appellant's Appendix* at 10, this case did not involve a true default judgment. *Thompson v. Clark County Div. of Family & Children*, 791 N.E.2d 792 (Ind. Ct. App. 2003) quoting *Young v. Elkhart County Office of Family & Children*, 704 N.E.2d 1065, 1068 (Ind. Ct. App. 1999) (stating "[w]here an issue of fact exists between the parties, a default judgment is improper. The court, may, however, proceed to evidence and, if a prima facie case is established, render the appropriate judgment. Such a judgment is a judgment on the merits") (citations omitted).

Initially, we observe that American public policy holds that children are likely raised best by their parents. *Baker v. Marion County Office of Family & Children*, 810 N.E.2d 1035 (Ind. 2004). Consequently, the involuntary termination of parental rights is a last resort. *Id.* Moreover, because parents have numerous opportunities to rectify their situations before the termination hearing, a termination hearing results only when attempts to rectify the conditions that led to removal from the parents have failed over a prolonged period. *Id.*

A parent in a proceeding to involuntarily terminate the parent-child relationship is entitled to representation by counsel. Ind. Code Ann. §§ 31-32-2-5, 31-32-4-1 (West 1998). Where a parent, whose rights were involuntarily terminated at trial, claims on appeal that his lawyer underperformed, we deem the focus of the inquiry to be whether it appears the parent received a fundamentally fair trial whose facts demonstrate an accurate determination. *Baker v. Marion County Office of Family & Children*, 810 N.E.2d 1035. The question, therefore, is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the children's best interest. *Id.*

The record reveals that Clements zealously represented Wiseman, despite his unexplained absence. Clements requested a continuance based on Wiseman's absence, both at the commencement and conclusion of the termination hearing. She also successfully objected to certain exhibits offered by MCDCS and cross-examined

witnesses. Additionally, we observe that Wiseman does not point to any excluded evidence that would have assisted his case, had he been given the opportunity to consult with Clements prior to trial. Nor does he challenge any testimony or exhibits offered by MCDCS. Further, he does not challenge the sufficiency of the evidence supporting the trial court's termination order. In sum, Wiseman has failed to show that he was prejudiced in any way by his counsel's performance. Without more, Wiseman's bald assertion that he received ineffective assistance of counsel because his attorney did not contact him prior to the termination hearing must fail.⁵

Wiseman next asserts that his trial counsel was ineffective for failing to object to the "improper" notice of the termination hearing. *Appellant's Brief* at 1. Specifically, Wiseman asserts that MCDCS failed to set forth the correct location of the termination hearing, and thus violated Ind. Code Ann. § 31-35-2-6.5 (West, PREMISE through 2006 2nd Regular Session).

To support this contention, Wiseman directs our attention to the following testimony:

[MCDCS]: Where is [Wiseman] today?

[Anderson]: He is unknown to our agency.

[MCDCS]: Did you go out to Juvenile courtroom ten (10) to see if
 he [Wiseman] went there?

[Anderson]: Yes.

⁵ Notwithstanding our holding here, we acknowledge that Indiana Professional Conduct Rule 1.4(a) requires "reasonable communication" between a lawyer and his client and we do not, by this opinion, condone attorney conduct in contravention of this rule. Incompetency of counsel revolves around the particular facts of each case. *Mato v. State*, 478 N.E.2d 57 (Ind. 1985).

[MCDCS]: How long did you stay?
[Anderson]: Til [sic] 1:30.
[MCDCS]: And did he ever appear?
[Anderson]: No.
[MCDCS]: Ok. Do you know where [Wiseman] lives?
[Anderson]: No.
[MCDCS]: Did you send him notice of today's hearing?
[Anderson]: Yes.
[MCDCS]: Was that sent to his last known address?
[Anderson]: Yes.

* * * *

[MCDCS]: And did that come back to you in the mail?
[Anderson]: Yes.
[MCDCS]: Delivered, Undelivered?
[Anderson]: Undelivered.
[MCDCS]: Ok. Did [Wiseman] contact you to let you know any new address?
[Anderson]: No.

Transcript at 13-14.

The record is unclear as to the exact room in which the termination hearing was ultimately held. The dialogue between MCDCS and Anderson, however, does suggest that it was moved from the original courtroom designated in the letter sent to Wiseman,

which he never received, to a different courtroom in the same building. Interestingly, Wiseman does not assert that he attempted to attend the hearing, but was unable to locate the courtroom. In fact, it is undisputed that Wiseman never received the alleged defective notice letter because he failed to provide MCDCS with his current address, as mandated in the agreed entry.⁶ Wiseman simply makes the leap in logic that he received ineffective assistance of counsel because his attorney failed to object to this alleged “improper” notice.

The record reveals that Wiseman was sent notice of the termination hearing, including the proper day, time, and location, pursuant to Indiana Code section 31-35-2-6.2. The record further establishes that the notice was returned to MCDCS “undelivered” as a result of Wiseman’s failure to provide his current address to MCDCS and to maintain regular contact with his caseworker. Thus, he could not have relied on the notice to his detriment. Moreover, Wiseman has not shown that he was prejudiced in any way by the alleged defect. Thus, his claim of ineffective assistance of counsel, based on the fact the termination hearing may have taken place in a different courtroom than what was indicated in the hearing notice letter, too, must fail. *See In re E.E.*, 853 N.E.2d 1037 (Ind. Ct. App. 2006) (holding no fundamental error existed where the Department of Child Services’ notice to parent was ambiguous as to the date and time of the final termination hearing).

⁶ Pursuant to the agreed entry, Wiseman agreed to “maintain contact with the [family case manager, here Anderson] every other week, or as the [family case manager] may subsequently direct . . . [and] shall notify the [family case manager] of any changes in [Wiseman’s] address, telephone numbers, employment, . . . and other significant changes in [Wiseman’s] status within five (5) days of said changes.” *The Exhibits* at 14.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.